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In the Supreme Court of the United States

OCTOBER TERM, 1942.

No. 639.

PRICE BROTHERS COMPANY,
Petitioner and Appellee Below,

vs.

FRANK SMITH,
Respondent and Appellant Below.

BRIEF OF RESPONDENT

To Petition and Brief of Petitioner for Writ of Certiorari to the United States Circuit Court of Appeals for the Sixth Circuit.

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To Petition and Brief of Petitioner for Writ of Certiorari to the United States Circuit Court of Appeals for the Sixth Circuit.

To the Honorable Supreme Court of the United States:

Inasmuch as the controlling facts in this case are so vitally important to a correct determination of it, we respectfully submit our Statement of Facts, in contradistinction to the Statement of petitioner herein, and to simplify matters, will refer to the petitioner as the "Price Company," and the Respondent as "Smith"; said respondent being the plaintiff in the original action and petitioner being the defendant.

This was an action for damages against the defendant, Price Company, on account of personal injuries sustained by plaintiff, Smith, on June 18th, 1940, when he was hurled from a scaffold by reason of the negligence of defendant while he was engaged, as an independent contractor, in the performance of certain brick and masonry cleaning work on a new building at Toronto, Ohio.

At the time of this accident, Smith was a partner in the contracting firm known as Frank P. Meglan Company,

engaged in the business of cleaning brick and masonry work, and had been a partner in said firm for about seven (7) years prior thereto.

Frank P. Meglan, on behalf of said partnership, entered into a contract with Price Company about June 5th or 6th, 1940, whereby said Frank P. Meglan Company agreed to perform certain brick cleaning work on said new building, which Price Company had constructed and erected as general contractor for the Ohio Edison Company, and in consideration whereof, Price Company agreed to pay the Frank P. Meglan Company the sum of Five Hundred Sixty ($560.00) Dollars. (R. pp. 88, 181.)

Under the agreement thus entered into, Frank P. Meglan Company commenced to perform certain work on June 17, 1940. On the following day, while both Frank P. Meglan and Smith were engaged in the performance of said work, and standing on a swinging scaffold suspended along the west side of the outer wall of said building, defendant, Price Company, negligently caused and permitted a hoisting cable to strike the scaffold in such a manner that it was suddenly and violently jerked, causing Smith to be hurled therefrom to the ground, from which he sustained a broken neck and other serious and permanent injuries. (R. pp. 93 and 31.) Smith was taken to the Steubenville Hospital several miles distant from the point of the accident.

Two days after the accident, W. C. Garvin, purchasing agent and paymaster for Price Company, called Frank P. Meglan to his office and suggested to Meglan that Smith be placed upon the payroll of the Price Company, so that Smith could obtain workmen's compensation under the Ohio Workmen's Compensation Act, to which suggestion Meglan said "If you think that is the best thing, all right"; but Smith was wholly ignorant of any such arrangement. (R. pp. 98, 99, 157.)

Pursuant to such arrangement and suggested manipulation of the records by the Paymaster of Price Com-

pany, one Dr. Casey, representing the Price Company, called upon Smith a day or two after that and only three or four days after the accident, while Smith was confined in the hospital under the influence of opiates and suffering great pain and mental and physical distress as the result of his severe injuries, and had Smith sign some paper in blank, which Dr. Casey said, was "for the State." (R. p. 81.) Smith did not, at any time, understand, nor was he told, that it was an application for state workmen's compensation; the first time he became fully aware that it was an application for compensation was when he began to receive checks from the Industrial Commission of Ohio, and then he assumed that they were checks due him by reason of the fact that his own firm, Frank P. Meglan Company, was also a contributor to the State Insurance Fund (R. pp. 82, 83, 184); the Ohio State Compensation voucher did not designate the name of the employer, and the first intimation that Smith had that he was getting the checks by reason of Price Company coverage was on October 24th, 1941, when counsel for Price Company took his deposition (R. p. 74), and he was not definitely aware until the progress of his trial brought forth additional information.

Notwithstanding the fact that the evidence clearly showed that Smith was an independent contractor, and that his signature was obtained to the Workmen's Compensation Application by Price Company in the manner as briefly set forth, the Trial Court instructed the jury to render a verdict in favor of the Price Company upon the ground that Smith was an employee of the Price Company and having filed an application for compensation, Smith was therefore estopped from prosecuting his common law action against the Price Company.

The evidence indisputably shows that Smith was employed as an independent contractor.

While this fact was disputed by counsel for the defendant, principally upon the basis that Smith had filed an application for workmen's compensation, which indi-

cated that he was an employee of the Price Brothers Company, defendant, nevertheless all of the evidence with the exception of this disputed application for compensation clearly, definitely and conclusively shows that Smith was an independent contractor.

ARGUMENT AND LAW.

It is conceded that the Ohio Workmen's Compensation Law is applicable only to employees—and not to independent contractors.

The evidence clearly indicates that Smith was not an employee of Price Brothers Company, and, therefore did not come within the scope of the Workmen's Compensation Law. Hence, the all-controlling question to be determined upon trial was the status of Smith at the time he was injured; that was the first thing that should have been determined, and it would be the jury's function to determine it, not the Court's. If the jury had determined that Smith was an employee of Price Company, and not an independent contractor, it would be required to return a verdict for the defendant; for if Smith were an employee of the Price Company, his only remedy would have been the Workmen's Compensation Act. But, since Smith was an independent contractor, his proper and only legal remedy is this action in tort against the defendant, Price Company.

Simply one or two essential and fundamental propositions were necessary to be determined by the jury, under proper instructions of the trial court. For instance:

> *First:* Whether or not he was an employee of the Price Brothers Company within the purview of the Workmen's Compensation Act. If the jury, under all the facts and circumstances, found that he was, then, in that event, the jury's functions would end and a verdict for the defendant would necessarily have to be rendered.
>
> *Second:* On the other hand, if the jury, under all the facts and circumstances, found that he was not

an employee of the Price Brothers Company, but that he was, at the time, in truth and in fact, an employee and partner of an independent sub-contractor, then it would be the duty of the jury to determine whether there was negligence on the part of the Price Brothers Company directly and proximately producing the injuries that he sustained, and if the jury found that the defendant was negligent, directly bringing about the injuries, the jury then should award him such an amount that in their judgment would justly and fully compensate him for such injuries.

The application for compensation supposedly signed by Smith should have been introduced solely for the purpose of bearing upon the question as to whether or not he was an employee of Price Company, and for no other purpose; the application should have been introduced simply as a circumstance tending to prove the fact that he either was or was not an employee of Price Company. But the value or the weight to be given to such application should have been determined by the jury from all the facts and circumstances.

For instance, did he intend to file an application? Did he know he was filing an application for compensation? Did he believe that he was filing an application for compensation from the Price Brothers Company? What was his state of mind and physical and mental condition at the time his signature was obtained upon such application? Those were some of the questions for the *jury* to determine.

The evidence in this respect tends to show indisputably that his signature was obtained upon a paper, not knowing that it was an application for workmen's compensation; that if he had known that it was an application for state compensation, he would not have signed it; that he did not intend to apply for any workmen's compensation from the Price Brothers Company; and that he was truly ignorant of the fact that he was making application for compensation. (R. pp. 73-74.)

Under all these facts, it was for the jury to determine what weight and value they were to give to that circumstance (signing the application) as bearing upon the questions of whether or not he was an employee of Price Brothers Company.

The Ohio Law that should have been followed.

We respectfully submit that, under the facts, the following cases clearly chart the course that the trial court should have taken:

Perry vs. The M. O'Neil Co., 78 O. S. 200:

Court's Opinion at page 209:

"* * * If a party suing to recover for personal injuries *admits the execution* of a release and seeks to avoid it on equitable grounds, he must obtain that relief to maintain his action, *when he denies the execution of the release,* or that it is his act, on the ground of want of mental capacity at the time he signed it, or that his signature to the release was procured by fraud, such as misreading, the surreptitious substitution of one paper for another, or obtaining by some other trick or device an instrument which he did not intend to give, he may maintain his action without obtaining a decree."

Accordingly such pronouncement of the law of the Supreme Court of Ohio was applied in case of an employee executing an application for compensation while mentally incapacitated and without his knowledge and consent:

Affield v. The Paige Dairy Company, 11 O. A., page 122:

"2. A fraudulent and void application for compensation from the State Insurance Fund, executed by an employee while mentally incapacitated and filed without his knowledge or consent, does not bind such employee or confer jurisdiction upon the Industrial Commission."

"3. In an act
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and followed.)" ction brought under the provisions of , General Code, the question of mental ecute an application for compensation insurance fund is one of fact for the per instructions from the court. (*Perry eil Co.*, 78 Ohio State, 200, and *Brown Mfg. Co.*, 98 Ohio State, 440, approved

In the Opinion, th

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mission of Ohio the Court, at page 123, said: I. Affield, the plaintiff in error, was em- kman in the automobile repair depart- endant. While engaged as such work- jured in an elevator accident in the the defendant, on August 4, 1917." days after the injury an application n out of the state insurance fund was d and filed with the Industrial Com- * * *."

At pages 124-125:

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to the merits." 18, plaintiff, ignoring the application ng theretofore had, filed his petition leas Court of Lucas County claiming he defendant company on account of ned to have been received while in the company at their place of business defendant company answered, and in se set up the application by Affield from the state insurance fund on uries, and all the proceedings relative n for leave to withdraw by Affield, roceedings and the application to be secution of the suit in the Common the second defense they answered

At page 128:

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be final. In his r is further clear that to give the com- on in the premises a valid application If the commission had jurisdiction ions of the law, its findings would eply in this case, the plaintiff denies

the signing and execution of the application, and denies the filing of the same, and avers the application was not read to him; that he was told it was a report of the injury; and that at the time he was suffering great mental and physical distress because of the injuries which he had received and that he was not mentally capable at the time of transacting business of any kind or character; that he did not know and had no means of knowing the contents of the application; and that his signature was procured thereto fraudulently and that the application is wholly null and void. These averments, if true, show the application to be void and of no effect, and such a paper filed with the Industrial Commission could not confer jurisdiction on the commission to take any action in the premises, and could have no more binding effect on the plaintiff than if the application had not been made. *This being true, the plaintiff had the right to maintain an independent action, ignoring wholly any proceeding before the Industrial Commission.*"

The latter proposition announced in the *Perry* case, *supra,* is the one applicable in the instant case. That is, that appellant had a right to maintain his action—without first obtaining rescission or cancellation—and have the whole matter determined by the jury under proper instructions of the court.

The salient facts, as pertinent to this phase only, show indisputably:

(1) That Smith did not know that he was signing an application for compensation as an employee of Price Brothers Company;

(2) That he did not intend to sign any such application, although his signature was obtained to such an application.

Under those facts any such application for compensation was void *ab initio.*

Brown v. The Kiechler Mfg. Co., 98 O. S. 440:

"It is ordered and adjudged by this court, that the judgment of the said Court of Appeals be, and the

same hereby is reversed; for the reason that the issue joined by the pleadings as to the mental capacity of the plaintiff to contract at the time he signed the paper writing purporting to be a release, as set forth in the answer, is a question of fact, to be determined by a jury under proper instructions, and for this reason, the trial court erred in directing a verdict for the defendant. (*Perry v. The M. O'Neil Company,* 78 O. S. 200, approved and followed.)"

Then again, the case of:

Martin, et al., v. Sentker, 12 O. A. 46, which holds:

"Syllabus 3. A void release may be ignored in plaintiff's petition, and, when relied upon by the defendant in his answer, the plaintiff by reply may set up the facts which render the release void. **A tender back of money received under a void release is not condition precedent to a right of recovery.**"

From opinion, pages 49 and 50:

"Defendants claim that the judgment should be in their favor for the reason that the plaintiff did not tender back the amount of money received by her in settlement of her claims by way of an alleged release."

"The release first appears in the case in the answer of the defendants. The reply of plaintiff denies the execution of the release in the first instance, and further claims that if her signature was obtained thereto she was mentally incapacitated at the time of signing the same, of knowing that she did sign it or of understanding what she was signing. The Court submitted to the jury the question of whether or not the plaintiff signed the release; also the question, if she signed it, whether she was mentally incapacitated at the time, establishment of which claim was placed on plaintiff. The jury resolved these issues in favor of the plaintiff. If the plaintiff did not sign the release, or signing it did not know what she was signing or that she signed it, in either event the release was void *ab initio.*"

Also, to the same effect:

Jones v. Pickle, 7 Ohio Appeals, 33 (from Court's Opinion, page 36):

"* * * We hold that no tender was necessary. * * *"

In point also, and in support of 11 Ohio Appeals, *supra:*

295 N. W. 120.
22 A. (2) 544;
4 So. (2) 128;

Smith's constitutional right clearly required the submission of his case to the jury. The trial Court did not hold that there was *no* evidence of fraud in procuring plaintiff's signature to the compensation application; in doing so, it invaded the province of the jury by weighing and considering the whole evidence and holding that Smith and not the Price Company perpetrated the fraud.

Knowledge of an Attorney.

The mere fact that one of the attorneys for Smith had permission to look over part or all of his record in the Industrial Commission, is of no consequence, nor does it in any way militate against Smith. The evidence in the record merely shows that an attorney of Smith was granted the privilege of examining the records, and nothing more. Any information acquired from the records would be immaterial to this cause of action and could not in any wise estop Smith from maintaining his common law action against the Price Company. We contend, and proved beyond any question, that Price Company conceived and acted upon the fraud and trickery to have Smith appear upon its payroll as an employee and got him to sign a blank application for compensation without his knowledge and consent, and while he was in great physical and mental distress and under the influence of opiates and narcotics.

On page 4 of Petitioner's Brief it is admitted that: "A day or two after the accident, petitioner's paymaster called Meglan to his office and drew up an ante-dated acceptance of the proposal of June 8th." Common justice dictates that he who has promoted a fraud and caused it to be committed by one upon another, can not subsequently thereto, assert such fraud as a means of relieving himself of any pecuniary liability. Then again, this action is not against the Industrial Commission of Ohio, the latter being a complete stranger to the defendant. It is nothing out of Price Company's pocket, if the Industrial Commission paid workmen's compensation to Smith.

We agree with counsel for Price Company that, as an abstract proposition of law, information obtained by an attorney while acting for and on behalf of his client, is ordinarily imputed to his client, but *such knowledge must be of such character as to materially affect the cause of action.*

Assuming, for sake of argument, that the Attorney for Smith acquired information that he did sign an application for compensation; that the attorney also acquired the information that such application was fraudulent and caused to be signed by Smith without his approval and consent, and while he was in a state of mental and physical distress which prevented him from properly transacting any such business. Does that knowledge of the attorney—even if imputed to Smith—conclusively bind Smith to submit to the jurisdiction of the Industrial Commission and automatically bar him from the prosecution of this suit against the Price Company?

Before those questions can be answered in the affirmative, two other questions must first be answered affirmatively:

1. Was a valid application filed?
2. Could Smith, under the evidence and law in this case, qualify as an applicant for compensation under the terms of the statute?

The Court of Appeals answered those questions clearly and definitely in its opinion:

1. "The facts disclosed by appellant, if true, show that the application * * * was void, not merely voidable * * *." (R. p. 223.)
2. "* * * As disclosed by the evidence and law in the case at bar, appellant could not qualify as an applicant for compensation under the terms of the statute. * * *" (R. p. 222.)

Consequently, as the Court of Appeals held, in its opinion (R. p. 223):

> "Under these conditions appellant had the right to maintain an independent action against appellee and ignore any proceedings he had theretofore instituted before the Industrial Commission, *Affield v. The Paige Dairy Company,* 11 O. App. 122."

One of the main points of discussion in the brief of Price Company is that it would be illogical for one to be an employee of another and at the same time be, with respect to that other, an independent contractor. Indeed, this is true. But Smith never, at any time, claimed to be an employee of another, he was always an independent contractor from the very beginning of the transaction to the time of his accident. Any such confusion, if existing, was created by Price Company, and not by Smith, by placing him on its payroll a day or two after the accident, and having him sign an application for workmen's compensation in blank when he was not mentally able to understand the transaction.

It is well settled in Ohio that compensation from the state insurance fund is not a bar to an action against a third person whose negligence has caused the injury:

Herbruck v. The Burger Iron Co., 44 O. A. 475:

> "In Ohio the receipt by an injured employee of compensation under the Workmen's Compensation Law is not a defense to his common-law action to recover dam-

ages for his injury from one who is not his employer under the provisions of said law."

To the same effect:

Trumbull Cliffs Furnace Co. v. Schachovsky, 111 Ohio State, 791.

Citations of Price Company Distinguished.

Industrial Commission of Ohio vs. Broskey, 128 O. S. 372, is in no way applicable to the facts of the instant case. On page 373 of the Court's Opinion it is said:

> "It is agreed by and between counsel for the claimant and counsel for the state insurance fund that on the 22nd day of September, 1929, the **claimant was employed by** *The Union Motor Transit, Inc.* * * *."

Broskey was an employee—not an independent contractor. Therefore his remedy and his *only* remedy was via the Workmen's Compensation Law.

But what about Frank Smith? Where is there any concession that he was an employee? Smith was an *independent contractor.* At any rate, it was the jury's function to decide his status, as we have heretofore pointed out.

Likewise, *Conrad vs. Coal Company,* 107 O. S. 387, is not applicable to this cause for the following reasons:

> *First:* Conrad was an employee of the employer coal company; he was in no sense an independent contractor.
>
> *Second:* Therefore, all rights or proceedings of Conrad were governed by the Workmen's Compensation Law.

Whereas Smith was not an employee of Price Brothers Company, and therefore the Industrial Commission had no *legal* jurisdiction over the matter for the reason that the relationship of employer and employee did not exist at the time of the accident.

Since Smith was an independent contractor, and therefore not in the same category as an employee of Price Com-

pany, and not amenable to the provisions of the Ohio Workmen's Compensation Law, it necessarily follows that neither the signing of the application nor the acceptance of the compensation checks—under misapprehension or otherwise—could in any way affect any rights or causes of action in tort against the appellee.

In conclusion, we submit, that there is no new question to decide in this case because the conclusions announced by the Court of Appeals for the Sixth Circuit are not in conflict with and do not constitute departures from applicable decisions and the law of the State of Ohio, therefore, the petition herein for Writ of Certiorari should be denied.

Respectfully submitted,

JOHN RUFFALO,

CLINTON J. WALL,

Attorneys for Respondent.